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# In the Supreme Court of the United States

OCTOBER TERM, 1945

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No. 913

HARRY CIVILETTI, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Tax Court (R. 11–16) is reported in 3 T. C. 1274. The opinion of the Circuit Court of Appeals (R. 27–30) is reported in 152 F. 2d 332.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 6, 1945. (R. 31–32.) The petition for a writ of certiorari was filed on

March 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the "receiving" commissions awarded to a New York trustee in 1940 on an intermediate account are excluded from the application of Section 107 of the Internal Revenue Code because they do not constitute compensation paid on completion of services.

### STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*, pp. 8–11.

### STATEMENT

The facts were in part stipulated (R. 21–22) and in part found by the Tax Court (R. 12–13):

In 1929 taxpayer was substituted as one of the trustees for two trusts created under the will of Adelaide E. Harris, who had died in 1913. The trusts were for the benefit of the decedent's daughter during her life, and upon her death the remainder of one trust was to go to the decedent's grandson and that of the other to her granddaughter. The taxpayer has performed his duties as trustee since his appointment. (R. 12.)

In each year there was an accounting to the life beneficiary and taxpayer received the commissions provided for by New York law for receiving

and paying out the income of the trust. During the period 1929 to 1940 an aggregate of at least $17,000 was paid on that basis. (R. 12.)

In 1940 the trustees filed an intermediate accounting with the Surrogate's Court and a decree was entered settling the intermediate account and allowing taxpayer the sum of $31,025.12 for his services to the two trust estates. (R. 12.) Of this amount $15,346.35 was paid for receiving the principal of trust No. 1 and $15,334.76 for receiving the principal of trust No. 2; $172.41 was paid for disbursements of principal from trust No. 1 and $171.60 for disbursements of principal from trust No. 2. (R. 21–22.)[1]

In his income tax return for 1940 the taxpayer reported the commissions on principal received in that year, and apportioned that amount for income tax purposes over the years 1929 through 1940, relying on Section 107 of the Internal Revenue Code. (R. 12–13.) The Commissioner ruled that the taxpayer was not entitled to the benefits of Section 107. (R. 8.)

The Tax Court upheld the Commissioner's determination on the ground that the trustee's services as to income and principal were not separable so that the taxpayer's income commissions should

[1] Petitioner states (Br. 10) that all of the commissions were paid for receiving and none for paying out principal. This contention is at variance with the stipulation entered into between the taxpayer's counsel and the Chief Counsel, Bureau of Internal Revenue, subsequent to the Tax Court's opinion. (R. 21–22.)

be lumped with the principal commissions; therefore, taxpayer's commissions as trustee in 1940 did not constitute at least 95% of the total compensation received for services as trustee. The Tax Court thus found it unnecessary to decide whether the commissions received by the taxpayer were received only upon completion of the services. (R. 13–16.)

The Circuit Court of Appeals affirmed upon the ground that the commissions received by taxpayer in 1940 had not been paid on completion of the services. (R. 27–30.)

## ARGUMENT

This case does not present any conflict of decisions. It was correctly decided and involves no substantial question of importance to be decided by this Court.

The only cases which have considered the application of Section 107 of the Internal Revenue Code (Appendix, *infra*) to trustees' commissions are this case and *Smart* v. *Commissioner,* No. 912, in which a petition for writ of certiorari is also pending before this Court and which involves a different issue. Unlike the *Smart* case, this decision is grounded upon the requirement, applicable to the taxable year 1940, that taxpayer's compensation must have been "paid * * * only on completion of such services" in order to take advantage of Section 107.

The "completion" requirement was removed by

Congress when it amended Section 107 by Section 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798. The statute no longer requires that the services must have been completed so that obviously no question of current importance is presented for review by this case.

The decision is clearly correct. The Circuit Court of Appeals properly interpreted the statute to require that compensation be paid only upon completion of the job or task for which taxpayer is engaged and paid. It is quite evident that taxpayer's duties in connection with the trust principal were not finished. The court correctly held that under New York law the so-called "receiving" commissions and "paying out" commissions in respect to principal are not paid for the simple acts of receiving the principal and paying it out but rather for all services in its care and investment. *Matter of Bushe,* 227 N. Y. 85. The petitioner does not contend otherwise. Section 107 cannot be interpreted, as taxpayer claims, to cover these principal commissions merely because the services for which paid had been rendered. The Circuit Court of Appeals points out that such an interpretation would cover installment payments while a job was in progress merely because the payments were made for work already done; it felt that clearly such payments could not be squeezed into the coverage of the statute. Since advance payments were excluded by other language in the section, making the provision appli-

cable only to compensation received for services covering a period of five calendar years "from the beginning to the completion of such services," the phrase "paid * * * only on completion of such services" can have meaning only if applied to compensation paid after the whole job is finished.

The legislative history of the section removes any doubt of the correctness of the interpretation placed upon it by the Circuit Court of Appeals. In explaining the purposes of the legislation, the Senate Committee on Finance stated that it was designed to meet the hardship of taxing fully persons "who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking." S. Rep. No. 648, 76th Cong., 1st Sess., p. 7 (1939-2 Cum. Bull. 524). A subsequent legislative revision embodied in Section 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798, which removed the "completion" requirement, emphasized the Congressional understanding that Section 107 required the services to have been completed. After receiving the Revenue Bill of 1942 from the House, the Senate amended Section 128, which amended Section 107 of the Internal Revenue Code, so as to remove the "completion" requirement. See S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 108–110 (1942–2 Cum. Bull. 504). In conference the House managers accepted the Senate amendment which, they noted, deleted "the requirement that the personal services must

have been completed before the required percentage of the compensation is received * * *." H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 43 (1942–2 Cum. Bull. 701). This amendment of Section 107 reflects the belief of Congress that a substantial change had been made in the existing statute.

The Tax Court, in *Additon* v. *Commissioner*, 3 T. C. 427, allowed the benefits of Section 107 to a member of a bank liquidating committee on the view that the statutory requirement was directed only at advance payments. The Circuit Court of Appeals properly did not accept the reasoning of that case, but in any event in the *Additon* case the undertaking had been virtually completed for after payment for their services the committee became inactive, remaining in existence only to execute some ministerial acts.

**CONCLUSION**

No basis exists for review by this Court. The case does not present a question of substantial importance nor is there a conflict of decisions. The decision below is correct. The petition should, therefore, be denied.

Respectfully submitted.

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MARCH 1946.